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A VIEW FROM THE TOP OF THE LAW FIRM LADDER:

By Carol M. Langford and Nathaniel L. Nicoll

Carol Langford

MCLE BIAS

Excerpts from the Diary of a Certain Mr. Charles Bigglesworth III, Esq.

May 22nd, 1984

It is a dark day for law firms everywhere. While the winds of change have buffeted the legal landscape for decades, would we have ever guessed that our very own U.S. Supreme Court would assist in the corruption of our fine legal profession? Unanimously, no less. *Hishon v. King & Spalding*, 467 U.S. 69 (1984) came down today, and the ruling bodes ill for the sanctity of law firm partnerships throughout our great nation! Ms. Hishon, a woman lawyer, found employment as an associate at the venerable law firm of King & Spaulding in Atlanta. But this was not enough for her. Oh no, she took the partnership precisely at its word when it informed her that associates, after five or six years, advanced to partner as "a matter of course" if the associate received "satisfactory evaluations" and that associates were promoted to partner on a "fair and equal basis." After six years, instead of advancing to partner, Ms. Hishon was passed over and her employment was terminated. Nothing newsworthy there, the typical fate for a lot of female lawyers. It is how the Supreme Court interpreted Title VII that I find puzzling:

"It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."
42 U.S.C. Section 2000e-2(a)

The court ruled that the decision to advance an associate to partner in a private law firm falls under this statute. In its sagacity, the Supreme Court stated that, "An employer may provide its

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FROM THE CHAIR

Ed Poll

Welcome! This is the first column for me as your LPMT Chairperson. I look forward to working with your Executive Committee and visiting, in person, on-line or by this written word, with as many of you as possible during this next fiscal year.

But, before I get into some of my hopes and dreams for this next year, I want to take this opportunity to thank Carole Levitt, our Chairperson for 2003-2004. Under her leadership our group has accomplished a number of outstanding milestones. Some of these milestones include:

Revamping our web site (please visit it now at www.calbar.ca.gov/lpmt and see the back page of this newsletter for steps to access the members only section);

Creation of our first "stand-alone" program held in Fresno in September, an outstanding and daring achievement for our Section which would not have been attempted but for the courage and persistence of Carole;

Enhancement of our SEI and annual education programs under the expert chairmanship of Executive Committee member, Jim Robinson (we continue to be at the forefront of all other sections in quality and number of programs offered to the Bar);

Increase in our budgetary surplus by wise and astute budgeting activities (we spend less than we earn!)

Increased publishing efforts of members of our Executive Committee.

For this next year, we look forward to continuing the work of our Section. Obviously, we want to further the work started by Carole and our Executive Committee this past year, and I hope we can expand in other ways as well. Here are some of the ideas floating around in the canyon of my thoughts:

Offer our members, and members of the California Bar in general, resources that will help lawyers operate their law practices more effectively and more efficiently.

Expand our web site to include e-commerce so that lawyers can acquire the needed resources at their convenience.

Persuade the Board of Governors to modify the MCLE provisions to require that lawyers earn one unit of law practice management education as part of their general MCLE requirements.

Participate in the Conference of Delegates so as to bring the economic and technological perspective to the deliberations of the conference resolutions where appropriate.

Continue to reach out and encourage as many professional groups associated with the legal profession as possible to become liaisons and participate in the deliberations of the LPMT Executive Committee.

These are only a few of the goals that I believe are appropriate and achievable in the next six to 18 months. Your Executive Committee, at our October meeting, will further this discussion and lay out a plan of action for the next year. We would welcome your thoughts and comments. Please send them to me at edpoll@lawbiz.com or call (800) 837-5880.

In the meantime, I look forward to working with you and thank each and every one of you for the honor of being LPMT's Chairperson for 2004-2005.

Ed Poll

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employees with many benefits that it is under no obligation to furnish by express or implied contract. Such a benefit, though not a contractual right of employment, may qualify as a 'privilege' of employment under Title VII. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all."

Suffrage wasn't enough, now women want to become partners based on merit alone. Everyone knows that merit means little in the scheme of things. A partner must have good judgment, be likeable, he or she needs to be "one of the guys." At least the men can take solace in the reality that most women are still too burdened with domestic duties to take the practice of law seriously.

January 3rd, 1993

The dreadful hangover lingers. It is a small price to pay though for a fabulous New Years Eve with the partners at Bohemian Grove (and a few women too, but mums the word about that). Continuing changes in the practice of law are sobering indeed. I would never have guessed that women would have the tenacity to really stick with the practice of law. Apparently, even men of wisdom can be wrong. Not only have women stuck with the practice of law, the number of female partners continues to grow. Among the top 100 firms, more than 10 percent of the partners are women at this time. Thankfully, this number is still quite anemic, considering that women make up more than a third of graduating law school classes and associates. Now don't get them wrong, men like women, just not at the managing level of a law firm.

It looks like the gradual shift toward an eat-what-you-kill mentality at firms is effectively preventing many women from advancing through the ranks. By encouraging a system that values the accumulation of billable hours over all else, many women are invariably unable to rise to the level of their male counterparts. Men understand that women become trapped in the quagmire of society's expectations and dedicate more time than men to family concerns. But they sure haven't shown an overwhelming desire to quit work to spend their days chauffeuring kids to soccer games. By splitting their time between the home front and the firm, many women are unable to accumulate the billable hours now required to achieve partner status. And let's face it, those hours have gone up. With all the hours our wives spend at home, male lawyers have hours to spare, hours that assure our assent to partnerdom. Whoever came up with the idea of using billable hours as the primary factor for deciding who becomes a partner was a visionary; an apparently neutral factor that, when coupled with the expectations of traditional American values, prevents many women from rapidly acquiring the keys to the castle.

On another disturbing front, minorities persist in studying and practicing law in growing numbers. While many grow frustrated with the cultural insensitivity and stereotyping at many firms and seek jobs in the government sector or minority law firms, some are making partner at the more traditional shops. Frankly, I do not know where the successful ones are getting their clients. With all the rainmaking we do at clubs and on golf courses, and with the lack of minorities in the upper echelons of the corporate sector, I thought guys like me had pretty much cornered the market. Personally, I'm impressed minorities have made any headway at all, considering the dearth of minority mentors.

March 1st, 1995

Dodged a bullet today. California Rule of Professional Conduct 2-400 came into effect. The new rule gave me a scare until I realized that prosecution under the rule would be about as likely as spontaneous peace in the Middle East. It was part (B) that gave us a fright:

> "In the management or operation of a law practice, a member shall not willfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age, or disability in: hiring, promoting, discharging or otherwise determining the condition of employment of any person."

The powers that be in California hamstrung the Rule brilliantly! The State Bar cannot even initiate an investigation into an alleged violation of Rule 2-400 unless another court has first adjudicated a complaint

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of discrimination and found that the unlawful conduct has occurred. Even then, the State Bar cannot act until the finding of unlawfulness has been upheld and is final after appeal, the time for appeal has expired, or the appeal has been dismissed. My guess is that cases prosecuted under this Rule will be few and far between. I imagine those ethical types are happy to have something on the books, even if it rarely sees the light of day.

July 15th, 2003

I must confess, while "white shoe lawyers" will be around for some time yet, it looks as if we might not always hold the reigns to the practice of law. We certainly are losing the war for exclusive control of the partnership. True, there is still a definite disconnect between the number of female and minority partners and the number of female and minority law school graduates, exemplified by the fact that women, while now accounting for 50 percent of law school graduates, only account for 20 percent or so of law firm partners. Even in racially diverse cities like San Francisco and Los Angeles the disparity has been glaring. After a decade-long effort to increase the number of minority partners in law firms by the Bar Association of San Francisco, in 1999 minority partners comprised only 2.6 percent of the partners at large mid-sized firms. I wonder if the plight of disabled lawyers has changed since that National Association for Law Placement study that showed that only 54 percent of disabled lawyers were able to find full-time jobs, and less than half of those were in private practice. Still, the presence of women and minorities is increasing, and while I cannot see that it has much to do with Rule 2-400, I do recognize a few of the culprits fomenting change.

To avoid the fate of firms like those in *Hishon* and its progeny, some firms have taken to more concrete partner review policies favoring reliance on objective criteria over subjective analysis. Such polices tend to safeguard partnership decisions from the review of courts and judges. This also results in a decision-making process with little room for bias; the makings of a meritocracy, I dare say. Some firms have actually started employing oversight groups independent of the partner-review board to ensure impartiality.

Another false promise has been the part-time track. Once, this was the oubliette for any lawyer who needed to split their time between family and the law. But while choosing to work less than 8 days a week can still effectively brand you as a second-class lawyer at many firms and bar you from achieving partner-status, some firms actually permit partners to rise from the ranks of part-time track lawyers. Though most lawyers are understandably leery about part-time tracks and the impact it could have on their career, only 3.9 percent of lawyers work part-time. It appears that at least 96 percent of large law firms offer part-time work.

The drums of change are beating; I have heard that even some of my fellow partners are questioning the necessity of sacrificing life and family for partnership.

Certainly, another source of change is the advent of sexual harassment policies. It is no longer a simple matter to approach a talented female lawyer with unwanted advances. Such ploys increasingly result in liability for the firm as well as a marred reputation for the partner. And if a law firm's policies are not effective enough, the courts have been willing to brandish the stick. That $7.1 million dollar judgment against Baker & McKenzie for sexual harassment still gives me chills.

January 15th, 2004, Afterthought

One cannot help but notice that similar changes are slowly coursing through corporate America. Perhaps I place the blame for the demise of the traditional system (that I sense is somewhere yet beyond the horizon) on the changing policies of firms. In reality, however, it is society in general that is changing and precipitating like change in the boardrooms, law firms, and golf courses of America. I admit, in the past I've been recalcitrant in my ways, but maybe the practice of law is outgrowing its traditions, evolving beyond the fraternity it has been in response to the demands of society. And maybe it's time for me to change. After all, I wouldn't want to be left behind.

Carol M. Langford, Nathaniel L. Nicoll, and Stephen Hollandsworth comprise the law firm of Carol M. Langford in Walnut Creek, California. They specialize in attorney conduct, ethics, and legal malpractice.

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QUESTIONS: A VIEW FROM THE TOP OF THE LAW FIRM LADDER

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1. The Supreme Court in *Hishon v. King & Spalding* ruled that the process of advancing an associate to partner was governed by Title VII.
True **False**

2. Title VII prohibits discrimination by sex but not by race or national origin.
True **False**

3. Between the 1980s and the 1990s the number of women partners in firms increased.
True **False**

4. In the 1990s the percentage of female partners was less than the percentage of female law school graduates and associates.
True **False**

5. Some believe that partnership considerations focused primarily on the accumulation of billable hours put some women at a disadvantage because of domestic demands.
True **False**

6. In the 1990s, while there were some minority partners, this percentage did not reflect the percentage of minority law school graduates and associates.
True **False**

7. The California Rules of Professional Conduct contain no rules regarding discrimination according to sex in the work place.
True **False**

8. California Rules of Professional Conduct 2-400 does not prohibit discrimination based on sexual orientation.
True **False**

9. The State Bar can initiate an investigation based solely on a complaint of discrimination under 2-400.
True **False**

10. Prosecution of complaints under Rule 2-400 by the State Bar are common.
True **False**

11. Most large law firms do not offer part-time employment.
True **False**

12. In recent times, less then 5 percent of lawyers opt to work part-time.
True **False**

13. A study in 1996 found that only 85 percent of disabled lawyers found full-time employment.
True **False**

14. The percentage of women partners at law firms now essentially mirrors the percentage of female law school graduates.
True **False**

15. In 1999 minority partners comprised only 2.6% of the partners at large mid-sized firms in San Francisco.
True **False**

16. Sexual harassment suits do not result in sizable judgments.
True **False**

17. It is not possible at any firm to advance to partner if a lawyer works part-time.
True **False**

18. The percentage of female partners at law firms is decreasing.
True **False**

19. Even if the possibility of advancing to partner at a law firm is not expressly stated in an employment contract, the partner-consideration procedure falls under the umbrella of Title VII.
True **False**

20. The requirement of billable hours quotas to advance to partner at a law office appears to place some women at a disadvantage.
True **False**